Andel Jewelry Corporation *and* Local 74, Service Employees International Union, AFL–CIO, Petitioner. Case 29–RC–8674

August 27, 1998

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN GOULD AND MEMBERS FOX AND LIEBMAN

The National Labor Relations Board, by a three-member panel, has considered objections to an election held on November 8, 1996, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 90 for and 142 against the Petitioner, with 31 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions[1] and briefs, has adopted the hearing officer's findings and recommendations,[2] and finds that a certification of results of election should be issued.[3]

Contrary to our dissenting colleague, we agree with the hearing officer that the Employer did not make a "speech" to a "massed assembly of employees" in violation of the rule set forth in *Peerless Plywood Co.*, 107 NLRB 427 (1953).

The hearing officer specifically discredited testimony that on November 7, 1996, the Employer made a "speech" in a manner similar to those it made during the weeks prior to the election. The hearing officer found instead that the Employer's conduct essentially was limited to distributing a campaign leaflet and answering any employee questions that arose. The Employer made no remarks unless there were questions, and even then the remarks simply mirrored the wording of the leaflet.

As the hearing officer correctly recognized, the *Peerless Plywood* doctrine does not proscribe the distribution of "campaign literature on . . . the premises at any time prior to an election." Id. Furthermore, the hearing officer emphasized that the Employer did not solicit employee questions, but merely answered questions as they were posed. During an election campaign, an employer can hardly be expected to ignore questions from its own employees. With respect to the incident in the polishing department on which our dissenting colleague relies, we agree with the hearing officer that the Employer's answering of questions individually did not amount to a speech made to all employees collectively.

Accordingly, we find no merit in our dissenting colleague's position, and we shall certify the results of the election.[4]

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Local 74, Service Employees International Union, AFL–CIO, and that it is not the exclusive representative of these bargaining unit employees.

MEMBER FOX, dissenting in part.

Contrary to my colleagues, I would sustain Petitioner Objections 5, 9, and 19 insofar as they allege that the Employer violated the rule set forth in *Peerless Plywood Co*., 107 NLRB 427, 429 (1953), which prohibits the "making [of] election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election."[1]

The record shows that the Employer repeatedly held captive audience meetings with employees that would have been prohibited by *Peerless Plywood* but for the fact that they occurred outside the 24-hour preelection period. Thus, the hearing officer found that during the last 2-1/2 weeks prior to the election, the Employer's chief financial officer, Joseph Manber, accompanied by a Spanish-speaking translator, conducted daily meetings during working time with employees in each of the Employer's departments. In each meeting, Manber distributed a campaign leaflet, which served as the topic for discussion.

On November 7, 1996, within the key 24-hour period before the election, the Employer engaged in conduct very similar to that which had occurred on a daily basis for the preceding 2-1/2 weeks. Chief Financial Officer Manber visited each of the Employer's departments during working time. He was accompanied by the same Spanish-speaking translator. Manber distributed a campaign leaflet, which was the focus of his remarks. The document in question claimed that the Petitioner was challenging the eligibility of 45 employees on the basis of their ethnic background.

[1] In the absence of exceptions, we adopt pro forma the hearing officer's recommendations that the Petitioner's Objections 2, 3, 4, 6, 10 through 17, and 22 be overruled.

[2] With respect to Objection 21, we do not endorse the conduct of the Board agent in telling employees that they could not vote while wearing union T-shirts. We agree with the hearing officer, however, that the Board agent's instruction to remove the T-shirts does not, by itself, warrant setting the election aside under the standard applicable to Board agent misconduct.

[3] Chairman Gould agrees that the portion of Objections 5, 9, and 19 related to *Sewell Mfg. Co.*, 138 NLRB 66 (1962), should be overruled for the reasons set forth in his concurring opinion in *Shepherd Tissue, Inc.*, 326 NLRB No. 38 (1998).

[4] Member Liebman concurs in the decision to overrule Objections 5, 9, and 19. However, she agrees with the dissent in *Electro-Wire Products*, 242 NLRB 960 (1979), that the Board erroneously held in that case and in *Associated Milk Producers*, 237 NLRB 879 (1978), that the rule of *Peerless Plywood* is not violated when an employer, on a systematic basis, meets individually with a substantial number of employees at their work stations on working time within 24 hours of the election and urges them to vote against the union. In the absence of a current Board majority to overrule *Electro-Wire* and *Associated Milk*, however, Member Liebman agrees that the hearing officer correctly applied that precedent here in finding that the Employer did not run afoul of the *Peerless Plywood* doctrine.

[1] I agree with my colleagues' disposition of the Petitioner's other objections.

The hearing officer found that the Employer's conduct on November 7, 1996, did not violate the *Peerless Plywood* rule. The hearing officer reasoned that Manber did not make a "speech" but only "brief remarks." The hearing officer also found that Manber did not assemble employees for the purpose of addressing them en masse. Rather, Manber's "real purpose" was to distribute the campaign leaflet.

Contrary to the hearing officer, I would find that the Employer did not confine its conduct to merely distributing the campaign document. The Employer anticipated that employees would be concerned about the controversial claims it was making in the leaflet, and it had its translator present to aid in the answering of questions should they arise. In some departments, employees did pose questions, which the Employer answered with the help of the translator. Specifically in the polishing department, the question-and-answer session between the Employer and the employees lasted about 15 minutes, a period of time that cannot be dismissed as de minimis. The polishing department employees were in effect a captive audience because they were on working time and were not free to leave their work stations where the discussion was taking place. The Employer thus was able to gain an unfair advantage over the Petitioner in that it delivered the "last, most telling word." *Peerless Plywood*, supra at 429.

In sum, I would find that at least in the polishing department the Employer did make an "election speech" to a "massed assembly of employees" on November 7, 1996, just as it had done on a daily basis in every department during the preceding 2-1/2 weeks. Because this incident occurred within 24 hours of the election, I would sustain the Petitioner's *Peerless Plywood* objections and direct a second election.